

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1056

To be argued by
FREDERICK T. DAVIS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1056

UNITED STATES OF AMERICA,

Appellee,

—v.—

AMPARO JIMENEZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

FREDERICK T. DAVIS,
JOHN D. GORDAN, III,
*Assistant United States Attorneys,
Of Counsel.*

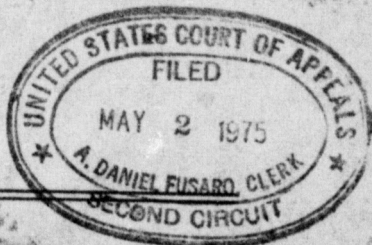




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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Amparo Jimenez * appeals from a judgment of conviction entered on February 13, 1975, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable William C. Connor, United States District Judge, and a jury.

Indictment 74 Cr. 906 was filed in three counts on September 24, 1974 ** charging Amparo Jimenez, together with Rosa Martinez, Luis Roman, Ricardo Gomez-Martinez, and Luz Echevery in Count One with conspiracy to possess and distribute narcotic drugs and Count Three with pos-

* Due to typographical error, the defendant's name was spelled "Jimens" in the indictment. She indicated at trial that her name was spelled "Jimenez" (Tr. 82) and that orthography is used in this brief.

** This indictment superseded Indictment 74 Cr. 875, which had been filed on September 16, 1974.

sessing approximately 150.0 grams of cocaine, and charging Rosa Martinez and Amparo Jimenez in Count Two with distributing approximately 21.0 grams of cocaine.

Jimenez' trial * commenced on January 6, 1975, and on January 8, 1975, the jury returned a verdict of guilty on all three counts.

On February 13, 1975, Judge Connor sentenced Jimenez on Counts One and Three to concurrent terms of one year imprisonment, to be followed by three years special parole. On Count Two Jimenez was placed on probation for three years, to run concurrently with the sentences imposed on Counts One and Three.

Jimenez is presently serving her sentence.

Statement of Facts

The Government's Case

The Government's case against Amparo Jimenez consisted principally of the testimony of Ramon Acevedo, an informant who had been arrested himself in April, 1974, on a drug charge, had pleaded guilty to that charge, and had agreed to cooperate with agents of the Drug Enforcement Administration in an effort to discover and arrest other narcotics dealers (Tr. 90). He stated that during

* Martinez, Roman and Gomez-Martinez failed to appear at the trial, originally scheduled for December 6, 1974. Bench warrants were issued for their arrest, and when they could not be found on the date fixed for trial, January 6, 1975, their case was severed from that of Jimenez (Tr. 6). Also at the commencement of trial the Government asked for a severance as to the defendant Luz Echevery in order that the case against her could be re-examined with a view to dismissing it; this motion was granted (Tr. 3) and an order of *nolle prosequi* was subsequently filed as to her.

Citations to "Tr." refer to the transcript of the trial.

the summer of 1974 he met the defendant Rosa Martinez, whom he had known previously in the Hotel Orleans in New York City, and that Martinez—whom he knew as “Marta”—asked him if he would like to purchase some “merchandise.” Acevedo told her that he did not, but took her address on a piece of paper, which he promptly reported to the DEA agents with whom he was working. (Tr. 95-98)

Acevedo then testified that he met Martinez several more times during the next few weeks at various locations on the West Side of Manhattan, and that during most or all of these meetings she was accompanied by the defendant Amparo Jimenez, whom he identified in court. (Tr. 98) During these conversations, Marta asked Acevedo again if he wanted “merchandise,” and Acevedo answered that he was interested. Also during this period, Acevedo introduced a friend to Marta who later accompanied Acevedo to Marta’s apartment at 305 West 97th Street and purchased from Marta—in the presence of Amparo Jimenez—two bags of marijuana. (Tr. 100)

Somewhat later in the summer, and under orders from DEA agents, Acevedo told Marta that he had a customer who was interested in purchasing an eighth of a kilo of cocaine for \$3,800, and Acevedo again had several conversations with Marta—again in the presence of Jimenez—about the prospective sale. On September 3, 1974 * Acevedo went to Marta’s apartment at 305 West 97th Street in order to procure a sample. He testified that he stood in a small kitchen in that apartment with Marta and Jimenez and asked Marta for a sample. Marta then told Jimenez “Go get a sample” (Tr. 186), and Jimenez then proceeded to the refrigerator, removed a larger quantity

* Acevedo himself did not remember the precise date for this or any other event. The date became clear, however, through the subsequent testimony of DEA agents on surveillance.

of cocaine, counted out a small sample, wrapped it in paper, and gave it to Marta, who gave it to Acevedo. (Tr. 109, 186-187) Acevedo paid Marta \$25 for the sample and left. He then turned the sample * over to Special Agent Kieran Kobell.

On September 4, 1974, Acevedo returned to the apartment at 305 West 97th Street at approximately 4:00 P.M., pursuant to an agreement with Marta the previous day to arrange the sale of an eighth of a kilo of cocaine to Acevedo's "customer". (Tr. 111-112) Upon entering the apartment, he saw Marta, Amparo Jimenez, and a man he had never seen before. (Tr. 112) Acevedo announced that his "customer" was ready and was told by Marta that he would have to return later to pick the cocaine up. (Tr. 113) Acevedo left and returned at approximately 7:30 P.M., this time wearing a Kel transmitting device that allowed agents outside the building to overhear and record much of the conversation in the apartment. (Tr. 114-115) He entered the apartment and was greeted by Amparo Jimenez, who opened the door for him, and saw, in addition to Marta and Jimenez, two men and a girl whom he did not know.** Marta told him that the cocaine would arrive any minute and that he should bring his customer to the apartment. (Tr. 121) Acevedo then went downstairs, met briefly with the agents, and soon thereafter returned to the apartment with Special Agent William Simpson, who was acting as Acevedo's "customer". At this point Marta, Jimenez and a baby were the only ones in the apartment, and Acevedo and Simpson sat briefly on the bed in a bedroom, while Marta talked about drugs

* The sample was later analyzed and found to be cocaine. (Tr. 299)

** At trial, however, he identified Government's Exhibits 1-B, 1-C, and 1-D as photographs of the two men and the girl whom he saw. (Tr. 119-120) Special Agent Kobell later identified the same photographs as being of Luis Roman, Ricardo Gomez-Martinez, and Luz Echevery. (Tr. 237).

with Acevedo and Simpson. During this period, Jimenez stood at the window of the apartment looking out into the street. (Tr. 133-137)

After several minutes, the two men and the girl who had been in the apartment returned and went into the kitchen, where they were immediately joined by Marta. Marta then brought from the kitchen a small package containing a white powder which she gave to Simpson. (Tr. 137-140) Simpson, after examining the package, said he had to get his money from his car downstairs and opened the door to the apartment, at which point numerous agents of the DEA entered and arrested the occupants. (Tr. 140)

Jose and Helen Classon also testified for the Government. Mr. Classon stated that he was the superintendent at 305 West 97th Street. He said that Rosa Martinez, whose photograph he recognized, had lived in the building for about six months prior to September 4, 1974, and that she shared the apartment with the defendant Amparo Jimenez, whom Classon identified in court. Classon stated that he was sure that Jimenez lived there since he saw her in the apartment early in the morning and late at night, and since she on occasion paid the weekly rent. He also said that while the room was rented in the name of Carlos Ortiz, the husband of Rosa Martinez, Ortiz had never lived in the apartment. (Tr. 196-201, 255-63) Mrs. Classon, who also identified the defendant in court, corroborated these details. (Tr. 264-269)

Finally, Special Agents Kieran Kobell, Michael Gray and William Simpson testified concerning their participation in the surveillance and arrests in the case. In particular, Kobell stated that on September 3, 1974, he drove Acevedo to 305 West 97th Street and picked him up a few minutes later and was given the sample of co-

caine, which he retained as evidence. (Tr. 272-273) In addition, Kobell described observing Acevedo enter 305 West 97th Street at 4:00 P.M. and at 7:30 P.M. on September 4, 1974, and equipping Acevedo on the latter occasion with the transmitting device, which he monitored while Acevedo was in the apartment. (Tr. 274-287) Agent Gray described entering the apartment at the time of the arrest, and finding on the bed in the bedroom a small package of white powder, which was subsequently analyzed and found to be roughly 150 grams of cocaine. (Tr. 299, 306) Agent Simpson testified that he accompanied Acevedo into the apartment on his final trip, saw Amparo Jimenez and Marta, and waited while the cocaine was procured. (Tr. 321-333)

Special Agent Kobell also stated that on September 5, 1974, he was present when Jimenez was interviewed in the office of Assistant United States Attorney Daniel Pykett and heard her tell Pykett that she lived at 345 West 53rd Street and that at the time of the arrest she was invited to a party at Carlos Ortiz' apartment. (Tr. 291)

The Defense Case

The defendant called no witnesses in her behalf.

ARGUMENT

POINT I

The Post-Arrest Statement of the Defendant was Properly Admitted in Evidence.

Part of the evidence against Jimenez at trial consisted of testimony by Special Agent Kieran Kobell that prior to the defendant's arraignment before a magistrate she told Assistant United States Attorney Daniel Pykett that she lived at 345 West 53rd Street, and that at the time of her arrest she had been invited to a party at Carlos Ortiz' apartment. The Government introduced further evidence showing that, in fact, Jimenez lived at 305 West 97th Street with Rosa Martinez; that Carlos Ortiz did not and had not lived there; and that there was no party in progress at that apartment.

Prior to the introduction of Jimenez' post-arrest statement in evidence, Judge Connor held an evidentiary hearing on Jimenez' claim, made for the first time in the midst of the trial, that the statement should not be received because it was taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). (Tr. 215-254) At the conclusion of the hearing, Judge Connor found that Jimenez' post-arrest statement had been made voluntarily and after she had been fully advised of her *Miranda* rights. (Tr. 254). On appeal, Jimenez claims that Judge Connor erred in this ruling. The contention is without merit.

At the evidentiary hearing, Assistant United States Attorney Daniel Pykett testified he interviewed Jimenez on September 5, 1974. He stated that before asking her any questions he told her that she had been arrested for a narcotics violation and that she was about to be taken

before the United States Magistrate at which time bail would be fixed; that he was an Assistant United States Attorney; that she had a right to refuse to answer any questions; that she could remain silent and that anything she said could be used against her in court of law; that she could have an attorney present during the interview; that if she could not afford a lawyer an attorney would be appointed to represent her, and she need not answer questions until she had had an opportunity to consult with the attorney; and that she could pick and choose, and answer some questions and not others. Pykett stated that after each of these statements he asked Jimenez if she understood, and she replied in the affirmative. (Tr. 218-221)* Pykett then asked her the questions and received the answers that were introduced at trial.

On cross-examination Pykett stated that while he told Jimenez that he was an Assistant United States Attorney, he did not explain to her exactly what an Assistant United States Attorney was. (Tr. 226)

Amparo Jimenez then testified. (Tr. 234-247) She stated that she did not understand at the time of the interview that Mr. Pykett was a prosecutor, that she did not understand what he meant by a "constitutional right," that she did not understand that she could consult with an attorney, and that she did not understand that a lawyer would be appointed to represent her. On cross-examination, she admitted that she had heard each of these warnings and "understood" them in the sense of grasping the words that were used in Spanish translation, but did not under-

* Pykett stated that he did not speak Spanish and that in interviewing Ms. Jimenez he used the services of Norma Seltzer, a court translator and interpreter. (Tr. 218) During the course of the trial it was stipulated that Ms. Seltzer was a fluent speaker of Spanish and English, and faithfully translated Pykett's questions from English to Spanish and Ms. Jimenez' responses from Spanish to English. (Tr. 334)

stand what they meant on the grounds that "I'm very dumb." (Tr. 240) She also admitted that she understood that she was under arrest at the time, and indeed had been in custody since the previous evening in the company of others who were arrested with her at the same time. (Tr. 239-240)

The claim by Jimenez that the express finding of the District Court that the statement was made voluntarily and after a full warning of her constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) was in error is based solely upon a distorted and overimaginative view of the facts in the record.

Jimenez concedes that at the time of her interview the Assistant United States Attorney warned her of each of her *Miranda* rights and that these warnings were translated to her in such a manner that she understood them, and indeed on cross-examination she stated that she heard and understood each of the warnings. The sole claim made is that the warnings were insufficient because Pykett did not explain what an Assistant United States Attorney was, and thus Jimenez was misled into thinking that he was a friend or an attorney appointed to represent her.

This claim is totally unsupported by the record.* The

* Indeed, two statements made in the appellant's brief appear to be total fabrications. First, the brief statements at two points that Ms. Jimenez was from a rural community in Puerto Rico (Brief of Appellant at 10-11, 12). On direct examination of Ms. Jimenez by her attorney the following colloquy took place:

Q. Prior to coming to New York, you resided in Puerto Rico; is that correct?

A. Before coming to New York, yes.

Q. And in Puerto Rico, did you live in a rural community?

MR. DAVIS: Your Honor, I object to leading at this point.

[Footnote continued on following page]

testimony was clear that both by direct statements and by the context of the interview Ms. Jimenez was made aware of the fact that she was speaking to an adversary. This was implicit in such statements by Pykett that "I told her we were going to take her before a magistrate," (Tr. 218-219) and the fact that Ms. Jimenez was under arrest and indeed still in the custody and immediate presence of the arresting officers (Tr. 218, 227). Ms. Jimenez' statements that she did not know what an Assistant United States Attorney was (Tr. 235) is inconsistent both with this factual context and with her own admission that she understood "that a lawyer would be assigned to me . . ." (Tr. 236). Finally, of course, her contentions on appeal are wholly inconsistent with the fact that the statement she made to Mr. Pykett was a *false exculpatory* statement, which shows beyond doubt that she spoke with Mr. Pykett not as with a friend or confidant, as she contends on appeal, but as to a prosecutor, with the purpose of deceiving and misleading him.

On the basis of this record, the District Court was fully justified in concluding that the statements were made voluntarily, and his finding in this regard is hardly clearly erroneous.

THE COURT: Yes Sustained.

Q. What type of a town or village did you live in?

A. I lived in Santurce. (Tr. 237)

On cross-examination, Ms. Jimenez admitted that Santurce is the second-largest city in Puerto Rico. (Tr. 241)

Second, the brief states twice (Brief at 11, 12) that Ms. Jimenez thought an Assistant United States Attorney was a friend or an attorney for her, and cites pages 234-237 of the transcript for this proposition. An examination of the entire record reveals no statement to this effect by Ms. Jimenez.

POINT II

The Evidence on all Counts was Sufficient.

A. The Conspiracy Count

Jimenez' argument that there was insufficient evidence to support the conviction on the conspiracy count ignores both the relevant facts and the law.

Contrary to the contention in her brief that the sole connection between Jimenez and the admitted drug dealings of Rosa Martinez was the procuring of the sample from the refrigerator on September 3, 1974, Jimenez was present at and a participant in virtually every stage of the dealings between Ramon Acevedo and Rosa Martinez, most of which occurred in the apartment Martinez and Jimenez shared. Acevedo testified that during most or all of his meetings with "Marta" following the initial encounter in the Hotel Orleans, Jimenez was present and that he "was talking to both of them". (Tr. 184) Furthermore, Jimenez was present when Marta sold two bags of marijuana to a friend of Acevedo (Tr. 100). And finally, Jimenez was present during both the sale of the sample on September 3 and the sale of the one-eighth of a kilo of cocaine on September 4. On September 3, she participated in the enterprise by separating out a sample of cocaine from a larger amount in the refrigerator of the apartment she and Martinez shared, *United States v. Sisca*, 503 F.2d 1337, 1343 (2d Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3281 (November 11, 1974), a stash the location of which she knew without being told; she then wrapped it for delivery to Acevedo. On September 4, she stood guard at the window, looking out into the street while Roman, Gomez-Martinez and Echevery left to get the cocaine. Viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Tropicano*, 418 F.2d 1069, 1074-75 (2d Cir. 1969),

cert. denied, 397 U.S. 1021 (1970), and particularly when viewed in the light of the defendant's false exculpatory statements at the time of her arrest, see *United States v. Rizzuto*, 504 F.2d 419 (2d Cir. 1974), the evidence was sufficient to warrant the jury's verdict that Jimenez participated in a conspiracy with Martinez and the others. *United States v. Mallah*, 503 F.2d 971, 975-976 (2d Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3511 (March 25, 1975); *United States v. D'Amato*, 493 F.2d 359, 362-65 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. 3208 (October 15, 1974); *United States v. Manfredi*, 488 F.2d 588, 596-597 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); *United States v. Barrera*, 486 F.2d 333, 337 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *United States v. Wisniewski*, 478 F.2d 274, 279-80 (2d Cir. 1973); *United States v. Ruiz*, 477 F.2d 918 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973); *United States v. Vasquez*, 429 F.2d 615 (2d Cir. 1970). Contrary to Jimenez' contention, this is not a case of "mere presence" at the place of a narcotics transaction, see *United States v. Johnson*, Dkt. No. 74-2437 (2d Cir., April 1, 1975). The record is clear that Jimenez concretely participated in the sale of narcotics and then lied about her relationship with the other participants at the time of her arrest. See *United States v. Rizzuto*, *supra*.*

* Jimenez' claim that only "one act" connected her with the conspiracy, and her citation of *United States v. DeNoia*, 451 F.2d 979 (2d Cir. 1971), are unavailing. Recent authority in this Circuit, *United States v. Torres*, 503 F.2d 1120, 1123-1124 (2d Cir. 1974), construing and harmonizing the line of cases on which Jimenez relies, has made clear that the sufficiency of the "single act" involved turns on an appraisal of all the evidence regarding the nature and scope of the conspiracy charged and the "qualitative nature of the [defendant's] act or acts . . . viewed in the context of the entire conspiracy". It is clear that Jimenez' contact with Rosa Martinez was not limited to the transaction involving the sample; rather, she was present with Martinez

[Footnote continued on following page]

B. Count Three of the Indictment

Jimenez apparently concedes the sufficiency of the evidence against her on Count Two of the indictment, the sale of the sample on September 3, but claims that the evidence connecting her with the sale of the eighth of a kilo on the following day was insufficient. The concession as to Count Two is fatal to her contention as to Count Three: since it was clear from the context and from the explicit testimony of Ramon Acevedo (Tr. 109) that the sample was intended to entice Acevedo's "customer" to purchase the larger amount of cocaine, it follows that by facilitating and indeed accomplishing the transfer of the sample Jimenez aided and abetted in the sale of the larger amount on September 4. This, together with the fact that Jimenez was present at the attempted sale charged in Count Three, which took place at an apartment shared by Martinez and Jimenez where cocaine was kept in the refrigerator, her proximity to the other co-conspirators, who spoke about the transaction in voices sufficiently loud to be picked up by the transmitter, her role in serving as a lookout during the sale, and her consciousness of guilt exhibited by her false exculpatory post-arrest statements were more than sufficient to demonstrate that she aided and abetted in the attempted sale that formed the basis of Count Three. Since the Court properly charged the jury on the requirements of aiding and abetting, (Tr. 405-406), *United States v. Falcone*, 109 F.2d 579 (2d Cir. 1940), it follows that this claim is frivolous. *United States*

during virtually all of Martinez' dealings with Ramon Acevedo. *United States v. Torres, supra*. Moreover, the evidence was overwhelming that Jimenez had "some knowledge of the broader conspiracy", *United States v. DeNoia, supra*, 451 F.2d at 981, as shown by her participation as a lookout at the September 4 sale and the false exculpatory statements. Indeed, her retrieval and preparation of the sample itself from the larger cache of cocaine was an act "from which such knowledge can be inferred", *id.*, since it was designed as a prelude to the subsequent sale and there can be no doubt that Jimenez understood this.

v. *Rivera*, Dkt. No. 74-2115 (2d Cir., March 13, 1975), slip. op. at 2279-2283; *United States v. Pui Kan Lam*, 483 F.2d 1202 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States v. Wisniewski*, *supra*, 478 F.2d at 279-280. See also *United States v. Harris*, 435 F.2d 74, 88-91 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

FREDERICK T. DAVIS,
JOHN D. GORDAN, III,
*Assistant United States Attorneys,
Of Counsel.*

